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ABSTRACT

Supreme Court Justice Antonin Scalia has been labeled an "enemy of the press" for his judicial opinions restricting or inhibiting the press's right to protected opinion. However, examination of his record suggests that his rulings do not constitute such a threat to journalistic freedom as many have been led to believe. His opinions generally fall into four categories: (1) defamation; (2) total prohibition on communication; (3) inhibition on communication; and (4) governmental control of information. Concerning defamation cases, Scalia has been nearly uniformly antipress, diluting the "Sullivan" actual malice rule in pretrial hearings, and narrowing definitions of "controversy" and "protected opinion." In cases of government prohibitions of communication, however, he does offer some prospeech decisions, such as in the "jellybean republic" case and the "Hill" case. Similar are his decisions in government restriction of speech situations, particularly in his rulings in favor of broadcast media's rights. Concerning government control of information, Scalia has been less prospeech with respect to press and citizen access to information without incurring heavy financial liabilities in defamation suits. While Scalia is no First Amendment champion his record is not quite so disastrous from a civil liberties perspective as popular and trade press accounts would lead one to believe. (Fifty-seven references are included.) (JC)

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ANTONIN SCALIA AND THE FIRST AMENDMENT*

A paper presented at the annual convention of the
Speech Communication Association
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*This paper is dedicated in loving memory to
PETER MICHAEL SIEGEL
(1959-1987)

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ABSTRACT

A LEXIS search was conducted in July of 1987 to identify all First Amendment- relevant cases participated in by Antonin Scalia on both the DC Circuit Court of Appeals and during his first term as an Associate Justice of the Supreme Court.

Cases fell generally into four categories: defamation; total prohibitions upon communication; inhibitions on communication; and governmental control of information.

The author concludes that, while no First Amendment champion, Scalia's record is not quite so disastrous from a civil liberties perspective as popular and trade press accounts would have led one to believe.

The media trade papers expressed much alarm at the nomination of Antonin Scalia to the Supreme Court in 1986 ("Supreme Court nominee is no friend of the press," 1986; "The newest Justice," 1986). Typical of press reactions was an article that appeared in The News Media & The Law, which reviewed Scalia's record as an appellate judge on the U. S. Court of Appeals for the District of Columbia. Scalia has "not only never voted in favor of the news media," the staff writer concluded, he "has been overtly hostile to the press on several occasions" ("Scalia decisions on Court of Appeals show that new Justice is no friend of news media," 1986).

The purpose of this paper is to retrace Justice Scalia's first amendment record as an appellate judge on the DC Circuit Court of Appeals, as well as his record during his first term (1986-87) as an Associate Justice on the U. S. Supreme Court. Cases for examination were identified through a LEXIS search in July of 1987 that called up all relevant cases in which Scalia participated (either by writing an opinion or by signing on to a colleague's opinion). Input search words were selected so as to unearth all cases in which reference was made either to the First Amendment, or to "freedom of speech" or "freedom of the press," or to the "Freedom of Information Act".

Cases fell generally into four discernible categories. First are the libel cases. Although Scalia participated only in four defamation cases at the appellate level, and none during his first term on the high Court, this is the area of First Amendment law that has earned him the most press (and the most scorn from the institutionalized press).

The second category of cases are those in which the government completely forecloses the act of communication; a closely related third category finds the government engaging in some action that, while not proscribing an act of communication, does inhibit the act. Scalia's First Amendment opinions during his first term on the Supreme Court all fell into one or the other of these two categories. The decision as to which of the two categories a particular case should be assigned is often a difficult one, as the government typically argues that it is not precluding the act of communication, but rather that its reasonable regulations only incidentally restrict the manner of the communication.

The fourth and final category includes cases in which the contested issue surrounds the government's right to gather information or to force its dissemination, or to keep information from the press or other interested parties. This category subsumes

FOIA litigation, as well as cases dealing with the Privacy Act and the Foreign Agents Registration Act.

A brief concluding section will summarize the pattern of Antonin Scalia's First Amendment decisions.

I. The defamation cases

There is likely no area of first amendment litigation of more day-to-day concern to the working press than defamation, and the press' concerns about Scalia's advancement to the Supreme Court is likely based most singly on his votes and opinions in defamation cases as an appellate judge.

The first case we will examine found Scalia adopting a more anti-press stance than even the Burger Court could embrace (Liberty Lobby vs. Anderson, 1984). The case arose from articles written by columnist Jack Anderson in his Investigator magazine that accused the Liberty Lobby and its principals of racism, neo-Nazism, and anti-Semitism. The trial court granted summary judgment for the defendants; one of the issues confronting the DC

Circuit Court (the issue embraced by the Supreme Court majority in its 1986 decision, overturning Scalia) was the burden of proof upon a libel plaintiff attempting to persuade a trial judge NOT to grant defendant's motion for summary judgment. The Sullivan doctrine (New York Times vs. Sullivan, 1964) tells us that public figure plaintiffs must demonstrate "actual malice" and must do so with "convincing clarity," but that burden of proof applied to the trial itself. Should the plaintiff shoulder the same burden in pre-trial stages?

Scalia concluded that such a burden of proof would be unfair at the pre-trial stage, that it "would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions" (p. 1570). The Supreme Court majority disagreed, finding that the Sullivan burden of proof is highly appropriate and is an effective means towards limiting both the number of frivolous libel suits brought against the press and the large number of cases that are allowed to go to trial and are lost at that level by the press, only to be overturned as a matter of law by an appellate court anyway. Interestingly, Justice Brennan adopted Scalia's position: to hold otherwise, he argued in dissent, would deprive litigants of their day in court, a

constitutional due process right as cherished as the first amendment itself.

At the DC Circuit level, the Liberty Lobby case presented more issues than just the burden of proof controversy that was eventually dispositive in the Supreme Court. We will examine two of these additional issues. The first is Scalia's refusal to accept Anderson's defense of the "libel proof plaintiff," the public figure whose reputation has already been so sullied by other press reports that he had nothing left to defend. Scalia responded:

> We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth. . . . We cannot envision how a court would go about determining that someone's reputation had been "irreparably" damaged--i.e., that no new reader could be reached by the freshest libel (p. 1568; emphasis in original).

The "libel proof plaintiff" was also argued in slightly modified form by Anderson, with the claim that the specific factual allegations that Liberty Lobby sought to prove maliciously

false were rather mild when compared to the many factual statements the plaintiff did not challenge, and which were thus presumably true. Scalia begins by questioning Anderson's premise. That plaintiff did not make a particular statement part of his libel suit does not mean he concedes its truth; at most it might mean that plaintiff could not show it was printed with actual malice. But there is more:

> /Plaintiff's/ theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls on its entirety. The law, however, proceeds upon the optimistic premise that there is a little good in all of us--or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity (p. 1568).

Judge Scalia did make one key pro-press finding in the Liberty Lobby case, one dealing not so much with how clearly or convincingly plaintiff must establish actual malice at the pre-trial stage, but rather with what might constitute such proof. The plaintiff in this case argued that the case should have been

allowed to go to trial, in that a jury could plausibly find actual malice by dint of the fact that plaintiff had warned Anderson by mail prior to publication that he was about to publish libelous falsehoods. This letter to Anderson did little more than state that warning, however, allowing Scalia to find that Anderson's ignoring the letter could not be deemed evidence of actual malice. Plaintiff would have to give "specific, verifiable facts" in support of his claims or warnings, Scalia ruled, not "mere allegations of falsity" (p. 1569).

Scalia's ruling on this seemingly minor point is made more interesting when we contrast it with another libel case heard by the DC Circuit during Scalia's tenure there. The question of what might constitute proof of actual malice was also very much at issue in Tavoulareas vs. Piro (1985). Mobil Oil president William Tavoulareas won a hefty libel judgment from the trial jury in his suit against the Washington Post and reporter Piro. The judge at trial reversed the jury, however, concluding as a matter of law that actual malice was not proven. It is Judge MacKinnon's majority opinion at the appellate level (joined by Scalia) that is of interest to us. Typical press reaction to MacKinnon's opinion is found in a recent issue of the Communication Lawyer, which rejoiced that the opinion had been "mercifully vacated" pending en

banc proceedings (Levine, 1986)--proceedings which eventually overturned the panel decision.

That which upset the press most about the MacKinnon/Scalia opinion was not so much that it reinstated the jury's damages award against the Post, but the reasoning used by the appellate judges to back up their decision. "The Post," MacKinnon opined, "is a newspaper which seeks, among other things, hard-hitting investigative stories," the kind referred to at trial by the Post's Assistant Editor, Robert Woodward, as "holy shit" stories, taken by the court to refer to "the same kind of stories upon which /Woodward/ built his own reputation: high-impact investigative stories of wrongdoing" (p. 120-21).

The particular story at issue in the Tavoulareas case, alleging that the plaintiff had used his considerable influence to help set his son up in the shipping business and then directed much of Mobil's contracts to him, was such a "holy shit" story, Judges MacKinnon and Scalia concluded. This "policy" of the Post's, seeking out such stories, "certainly is relevant to the inquiry of whether a newspaper's employees acted in reckless disregard of whether a statement is false or not" (p. 121). The jury need not "blind itself to evidence of editorial pressure for sensationalistic stories" (p. 121, n. 39).

The problem with all of this, of course, is that it flies in the face of the reason behind the actual malice standard itself, a standard designed to encourage and foster "robust and uninhibited debate" on important public issues. Engage in such debate at your peril, the press was being told. Even more disturbing is the logical leap that equates "editorial pressure" to do investigative reporting with editorial pressure to engage in shoddy journalism. The majority opinion for the en banc appellate court overturning the MacKinnon/Scalia holding was clear on this point: "Managerial pressure to produce such stories," wrote Judges Starr and Wright, "cannot, as a matter of law, constitute evidence of actual malice. . . . Rather, such managerial pressure is designed to produce stories that serve . . . one of the highest functions of the press in our society" (p. 796).

There is yet another disturbing feature of the MacKinnon and Scalia opinion in the Tavoulareas case, one that surprisingly the trade papers have ignored. Since the majority held that the jury's original finding of actual malice was proper, MacKinnon and Scalia did not have to address the earlier threshhold question of whether Tavoulareas should have had to prove actual malice in the first place. Was he a public figure?

Using an extraordinarily narrow conception of the "limited purpose public figure" concept from Gertz vs. Welch (1974), the majority strongly suggested that had it been called upon to rule on this issue, it would have found for plaintiff. A limited purpose public figure, of course, is a person who has "injected himself" into some kind of issue of public concern; he need not be a household name. Such a plaintiff will have to prove actual malice if the allegedly libelous statements deal with the particular issue with which he is associated. Clearly the CEO of a major oil company such as MOBIL injects himself into virtually all public issues regarding our use of our energy resources, and foreign policy decisions that stem from such uses. Thus any article bearing upon the allocation of MOBIL's immense wealth would deal with Tavoulareas the limited public figure, not the private citizen. MacKinnon and Scalia, however, define the controversy at issue to be "the subject of nepotism within Mobil," and thus find that this was NOT a controversy until Piro and the Post made it one!

Judge Scalia continued his pattern of anti-press votes in libel cases by joining Judge Silberman's opinion in McBride vs. Merrell Dow and Pharmaceuticals, Inc. (1986), which vacated a motion to dismiss. Dr. McBride, a prominent obstetrician who often

testified for plaintiffs in personal liability cases involving the pregnancy drug Bendectin, felt he was defamed by a Science article that compared his daily fee as an expert witness with those of such witnesses used by drug companies. The trial judge dismissed, ruling that a jury could not, as a matter of law, find the statements at issue defamatory. Silberman (along with Scalia) disagreed, claiming a jury could find the editors were implying that Dr. McBride's testimony is "for sale."

Yet another anti-press decision is found in Scalia's dissent in Ollman vs. Evans (1984), in which columnists Evans and Novak were sued by Marxist political science professor Ollman, who felt that the University of Maryland's failure to offer him a prestigious post for which he was being considered was a direct result of defamatory comments made by the columnists. Judge Starr's majority opinion affirmed the lower court finding that the alleged libels were actually protected opinion. In so doing, Starr proposed a 4-part test to determine whether an allegedly libelous statement was primarily fact-laden or primarily protected opinion. Judges should look to the usual meaning of the words; to the verifiability of the words; to the immediate context of the words; and finally to the more encompassing social context of the words

(e.g., when we read the editorials page, or a political cartoon, we expect to find opinions, not well-substantiated facts).

Scalia dissented from the Ollman majority, especially with respect to the one charge hurled against Ollman by the columnists that most plagued the court. Evans and Novak quote an unnamed source whom they describe as a liberal political science professor at a prestigious Eastern university to the effect that Ollman "has no status within the profession, but is a pure and simple activist" (p. 973). Rather than simply rejecting Starr's fact/opinion test, Scalia coopts it at least in part and reaches a very different conclusion from that of his colleague:

> I do not contest the principle that a politically disputatious context, like any element of context, can have some effect upon the properly understood meaning of a statement. If, for example, in the course of a diatribe against Marxist political thought Evans and Novak had written that "Ollman is an incompetent political scientist," the reader might understand that this was merely a corollary of their opinion that Marxism is spinach. But here they did not say he was incompetent. They said that his professional peers regarded him as incompetent--and there is no way that

conclusion can be understood to be a product of their econo-political opinions.

In fact, they went even further out of their way to dissociate this factual statement from their opinions: they put it in the mouth of one whom they describe as (1) an expert on the subject of status in the political science profession, and (2) a political liberal, i.e., one whose view of Ollman would not be distorted on the basis of greatly differing political opinion. They were saying, in effect, "This is not merely our prejudiced view; it is the conclusion of an impartial and indeed sympathetic expert" (p. 1037; emphasis in original).

For Scalia, the Sullivan actual malice standard provides sufficient protection to the press, and there is no need to strain for an absolute defense against a defamation action by transforming libelous factual statements into protected opinions. Moreover, if excessively high damage awards are the press' real concern, let the legislatures deal with that directly by imposing absolute dollar limits on libel damages (p. 1039). Interestingly, Justice White embraces this latter point in his separate concurring opinion in Dun & Bradstreet vs. Greenmoss Builders (1985), but in the context of an argument that the actual malice

standard itself might need to be re-assessed and judged too protective of the press.

In his defamation decisions, whether writing for himself or voting with a colleague, Scalia has been all but uniformly anti-press. Moreover, he has espoused some rather disturbing doctrine along the way: (1) dilution of the Sullivan actual malice rule in pre-trial hearings; (2) strainingly narrow definitions of a "controversy" so as to virtually eliminate the Gertz "limited purpose public figure"; and (3) stingy delineation of the scope of protected opinion.

II. Government prohibitions on communication

Cases discussed in this section present factual situations in which the government has attempted to completely foreclose (either through prior restraints or after-the-fact sanctions) a particular message or mode of transmission. We will begin by examining Scalia's record during his tenure on the DC Circuit Court of Appeals; next his record during his first year on the high Court will be the focus of discussion.

A. Judge Scalia

The demonstrators who commenced the litigation in Community for Creative Non-Violence vs. Watt (1983) endeavored to dramatize the plight of the homeless. Though they were permitted to remain in the park overnight, to lie down, and to close their eyes, they were not permitted to sleep, for that would constitute "camping" in the park, a forbidden activity. A 6-5 ruling of the DC Circuit Court of Appeals ruled against the government and would have permitted the demonstrators the right to sleep in the park as part of their demonstration were that decision not overturned by the Supreme Court in its next term.

Judge Scalia dissented from the majority opinion at the appellate level. The stinging tone of his words is of relevance to an assessment of his judicial stance towards first amendment issues. While other dissenters had assumed, even if just for argument's sake, that sleep could be expressive activity and therefore trigger a first amendment analysis (still finding for the government), Scalia clearly sets forth his view that sleep is not and could never be deemed "expression.": "That this should seem a bold assertion," he chided his colleagues, "is a commentary

upon how far judicial and scholarly discussion [of freedom of speech] has strayed from common and common-sense understanding" (p. 622).

Another case involving symbolic conduct also concerned a plaintiff who wished to demonstrate within the environs of the White House. Appellant in U. S. vs. Grace (1985) challenged the constitutionality and application to her of a statute that forbade the carrying of placards in the center zone of the White House sidewalk. The DC Circuit Court panel, of which Scalia was part, filed a per curiam opinion against Ms. Grace, in essence holding that the law was aimed not at the content of her message but existed rather to preserve an unobstructed view of the White House.

The remaining two cases in this category from Scalia's record as an appellate judge found the pro-speech litigants faring much better than in the aforementioned cases. Both decisions were penned by Judge Robert Bork, who was recently rejected by the United States Senate as President Reagan's nominee to fill the Supreme Court vacancy created by Justice Powell's retirement.

In Lebron vs. WMATA (1984), artist Michael Lebron sought to buy space on the Washington Metro system to place a political poster depicting Reagan and his advisers in a composite photo,

glaring at and laughing at a group of disheveled citizens while themselves reveling at a table laden with food and drink. The caption was to read, "Tired of the Jellybean Republic?" and the bottom of the poster was to provide text "critical of the Administration's policies" (p. 895). WMATA refused to accept the ad, claiming it was deceptive, in that "it depicts an apparent event which did not actually occur" (p. 895). Judge Bork ruled against WMATA, finding that the poster could not possibly deceive:

> The poster's text, the utter implausibility of the scene portrayed, the difference in lighting between the two halves of the photomontage, the awkward relation of the two groups of figures to one another, the difference in the sizes of the figures in the two groups, . . . make inevitable /the/ conclusion . . . that a mistake has been made by the district court. . . . "Tired of the Jellybean Republic?" The message is that of an advocate; it sets the poster's tone and alerts the reader that the message disparages the Reagan administration. There is no pretext of objectivity (p. 897).

Although Judge Scalia joined Bork's opinion, he apparently was considering writing a separate concurrence, because Bork indicates later that Judge Scalia "would decline to judge" the truth or falsity of Lebron's political message, owing to his

belief that to do so would violate a principle of "venerable antiquity" that such judgments are inappropriate, "particularly in the context of prior restraint" (p. 898). Thus, Scalia's vote is best interpreted as a disapproval of any scheme that permits WMATA or any governmental entity to impose prior restraints upon political messages by dint of the alleged falsity of those messages. In a very real sense, then, Scalia's view is even more pro-speech than Bork's--where the latter is saying to the WMATA, "not in this case, you don't!", Scalia is saying, "not in this, or any other, case, involving political speech!"

The final appellate case in this category also involves a prior restraint. This time the imposing agency is the Federal Trade Commission. At issue in FTC vs. Brown and Williamson Tobacco Corporation (1985) was the commission's enjoining of the tobacco company from advertising its new Barclay cigarettes employing the FTC'S own method of measuring tar and nicotine. (B&W's competitors had persuaded the FTC that the Commission's method, while usually accurate, produced deceptively low figures for Barclay, because of an unusual filter design). Judge Bork's carefully crafted opinion for the DC Circuit Court (joined by Scalia) is an exercise in finding the truly least restrictive means of achieving a legitimate state's interest. In essence, he told the FTC it may

not completely enjoin B&W from devising its own method of measuring tar, as long as that method was a fair one and the company's ads offered enough figures on competitors' brands for the consumer to make a comparative judgment. Whereas the trial court had required Barclay to seek FTC approval in advance of advertising any such new method, Bork held that "the FTC must bear the affirmative burden of demonstrating any inadequacy" of any such method (p. 45).

B. Justice Scalia

It would be difficult and possibly misleading to attempt to summarize Justice Scalia's first-term rulings in cases involving prohibitions on communication as simply "pro-speech" or "anti-speech." In part this is because some of the cases that came before him in his first term did not require him to tip his hand by clearly indicating his position; in others the cases themselves defy ready categorization. Thus, in City of Newport, KY vs. Iabobucci (1986), the Court summarily reversed a lower court ruling which had overturned a municipal ban on nude or nearly nude dancing in establishments serving liquor. Scalia took the opportunity to write a brief separate opinion in which he did not

indicate his view of the First Amendment issues posed by the case; rather he wrote only to express his displeasure at the Court's having dealt with the case through summary disposition, preferring himself to see it fully briefed and argued. Then too, in Board of Directors of Rotary International vs. Rotary Club of Duarte (1987), which held that California's interpretation of its own Civil Rights Act so as to prohibit Rotary from excluding female members did not violate the male members' right to freedom of association, Scalia filed a terse concurring opinion. He agreed with the majority judgment, but not necessarily its reasoning.

While obscenity ordinances, generically speaking, are clearly anti-speech, it is not clear how "pro-speech" or "anti-speech" a vote on either side in Pope vs. Illinois (1987) can be labeled. The narrow question in front of the Court dealt with the proper way to apply that part of the Miller obscenity doctrine (Miller vs. California, 1973) which tells us that no work with "serious literary, artistic, political or social value" can be deemed obscene. Should jurors be instructed, as they had at the trial level in this case, that this "SLAPS" test should be applied according to "contemporary community standards," that the work will be protected if the average community member would see such value in the work? The Court answered in the negative, finding

instead that a "reasonable person" test should apply, that jurors should ask themselves if a "reasonable" person would find serious value in the work. Scalia's separate concurring opinion questions the helpfulness of this new doctrine:

> **In my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled "reasonable man" is of little help in the inquiry, and would have to be replaced with, perhaps, the "man of tolerably good taste"— a description that betrays the lack of an ascertainable standard (p. 4597).**

In at least two cases during the 1986-87 term, Justice Scalia's votes were inarguably pro-speech. He joined the majority's striking down of a Houston ordinance prohibiting citizens from, among other things, "interrupting" a police officer in the execution of his duties (City of Houston vs. Hill, 1987), writing separately only to express his preference for finding the law unconstitutional for vagueness rather than for overbreadth. He also joined a unanimous Court in striking down a Los Angeles Airport Commission policy forbidding all "First Amendment activities" anywhere in the airport (Board of Airport Commissioners of the City of Los Angeles vs. Jews

for Jesus, 1987). That case presented such an egregious and blatantly unconstitutional affront to freedom of expression, however, that it probably should not be weighted heavily in our assessment of Scalia's first amendment record.

The remaining three cases in this category all found Scalia in the anti-speech camp, and at times vociferously so. In San Francisco Arts and Athletics vs. United States Olympic Committee (1987), the USOC brought suit against the promoters of the "Gay Olympics" in that the Amateur Sports Act gives the USOC exclusive use of the word "Olympics." Justice Powell's majority opinion, in which Scalia joined, found no constitutional infirmity in the extraordinary powers granted USOC by Congress in the Act; moreover, his opinion held that USOC was, despite weighty evidence to the contrary, a private agency that could discriminate against the gay group with relative impunity. Even Justice O'Connor was not willing to go this far, voting instead to send the case back to the trial court to develop facts on the allegation that USOC had selectively enforced its powers (p. 5068).

The First Amendment associational interests involved in the conducting of elections was the issue in Tashjian vs. Republican Party of Connecticut (1986). A state statute provided that in any political party's primary, only registered members of that party may vote. The state's Republican Party, however, wished to permit independent voters to participate in its primary. Justice Marshall, writing for a 5-4 majority, found that the law

unconsitutionally burdened the rights of Republican Party members "to enter into political association with individuals of its own choosing" (p. 4058). Scalia's dissent:

> In my view the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican Party, forms no more meaningful an "association" with the Party than does the registered Democrat who reponds to questions by a Republican Party pollster (p. 4064).

Scalia's most vigorous dissent appears in Rankin vs. McPherson (1987), wherein a 6-3 majority refused to uphold the firing of a government employee who had, after hearing of the attempt on President Reagan's life in 1981, remarked quietly to a coworker that "if they go for him again, I hope they get him". The majority held that McPherson's speech was not a true threat on the life of the President, but rather mere political hyperbole, especially in that it appeared in the context of oral criticisms she made of the President's economic policies and their effects upon Blacks. Scalia expressed outrage:

> There is no basis for the Court's suggestion that McPherson's criticisms of the President's policies that immediately preceded the remark can illuminate it in such

> fashion as to render it constitutionally protected. Those criticisms merely reveal the speaker's motive for expressing the desire that the next attempt on the President's life succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for that crime. The majority's magical transformation of the motive for McPherson's statement into its content is as misguided as viewing a political assassination preceded by a harangue as nothing more than a strong denunciation of the victim's political views (p. 5023).

While civil libertarians will not be overjoyed at Scalia's record on cases involving government prohibitions on communication, at least that record, unlike the pattern of opinions in the defamation cases, does present some pro-speech decisions. The "jellybean republic" case against the Washington Metro case is a striking example, as is the cigarette advertising case. That Scalia joined a unanimous Court in striking down the offensive Los Angeles ordinance is not extraordinary; that he did not defer to the special needs of the Police Department of Houston in the Hill case perhaps is.

III. Government restrictions and regulations of speech.

In this section we deal with cases wherein the government's posture is a bit less severe than in the previous category. Here the speech act is not proscribed altogether, but is arguably inhibited or "chilled." Again, we will first examine Scalia's record as an appellate judge, then look at his Supreme Court record.

A. Judge Scalia

Litigants in United Presbyterian Church in the U.S.A. vs. Reagan (1984), sought a declaratory judgment as to the unconstitutionality of "Executive Order 12333, United States Intelligence Activities," issued by President Reagan in October of 1981, which litigants feared would subject them to government surveillance despite the peaceable nature of their political activism. Judge Scalia's opinion for a panel of 3 judges affirmed the lower court's ruling that the plaintiffs failed to establish the kinds of "concrete harms, immediately threatened" needed to have standing to sue.

More recently, a 2-1 decision penned by Judge Bork and joined by Judge Scalia upheld the FCC's decision to not impose the Fairness Doctrine and the "Reasonable Access" rules governing political content of broadcast media to the new teletext technology. (The court, 3-0, agreed that the "Equal Time Rule" should be applied to teletext). Of far more interest to the media than the immediate context and facts of the case, Telecommunications Research and Action Center vs. FCC (1986), is Bork and Scalia's dicta to the effect that the scarcity rationale traditionally invoked to justify differential treatment of print and broadcast media was intellectually suspect: "Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media ... or announce a constitutional distinction that is more usable than the present one," Bork announced hopefully (p. 509).

Also of interest to broadcast media representatives is the panel's having used the case as a vehicle to add its voice to the continuing controversy surrounding whether or not Congress has ever actually codified the Fairness Doctrine. Bork concludes that it has not, and his argument is intriguing. When Congress amended the Communication Act in 1959 (mostly providing for a number of exemptions from the general "equal time" rule that any "use" of

media by one candidate requires response time by other candidates), it added that "nothing in the foregoing ... shall be construed as relieving broadcasters . . . from the obligation imposed on them under this act to operate in the public interest and to afford reasonable opportunity for the presentation of conflicting views on issues of public importance" (p. 517, citation omitted, emphasis Bork's). As Bork sees it, Congress addressed its admonition as one imposed under the Communication Act, not by the Communication Act. "This suggests," Bork continues, "that Congress viewed the doctrine as an obligation promulgated [by the FCC] pursuant to authority conferred under the Act, specifically, the public interest mandate, not as a fixed requirement frozen in place by the Act" (p. 518).

From Bork and Scalia's point of view, then, the FCC does have the authority to revoke the Fairness Doctrine, a view rejected by the Commission in 1985 ("Inquiry into Section 73.1910 of the Commission's rules and regulations concerning the general fairness doctrine obligations of broadcast licensees," 1985) but later embraced in 1987 (Halonen, 1987), largely owing to the intervening 1986 DC Circuit decision.

The final case in this category is one that defies treatment as a pro-speech vs. anti-speech controversy. The two competing

broadcast entities in Steele vs. FCC (1985) both wanted to "speak," in that the case was prompted by an FCC ruling in a "comparative evaluation proceeding" to determine which company would receive a license for a newly created FM radio station in Georgia. The novel question posed was whether the FCC erred in letting the fact that one of the applicants was female become the dispositive factor in her favor. A 2-1 majority of the DC Circuit Court (Judge Tamm writing, with Scalia signing on) ruled against the FCC's policy of preferential treatment for female applicants. Judge Tamm, in making his ruling, engaged in a heated exchange with dissenting Judge Wald concerning the FCC's assumption that diversity of ownership will produce diversity of programming:

> The minority preference rests on the assumptions that, first, membership in a minority causes members of that minority to have distinct tastes and perspectives and second, that these differences will consciously or unconsciously be reflected in distinctive editorial and entertainment programming. /But/ there is no reason to assume, for example, that an Italian station owner would primarily program Italian operas or would eschew Wagner in favor of Verdi. Similarly, it is questionable whether a black station owner would program soul rather than classical

> music or that he would manifest a distinctively "black" editorial view. Indeed, to make such an assumption concerning an individual's tastes and viewpoints would seem to us mere indulgence in the most simplistic kind of ethnic stereotyping.
>
> /Further/, it is not reasonable to expect that a woman would manifest a distinctively "female" editorial viewpoint. The editorial perspectives of the Washington Post and the New York Times, for example, seem close to identical, yet the former is published by a woman and the latter is not. Perhaps the Commission means to suggest, however, that if more women owned stations, they would program softer, more "feminine" music. Indeed, it is not clear which stereotype of women the Commission meant to indulge in adopting the female preference (p. 1198-99).

Judge Wald expressed concern that the majority was trivializing the Commission's legitimate interests in promoting a diversity of ownership:

> As the majority quite correctly states, women are not uniform in their choices of lifestyle, or their political, social or moral views. The point is not that these groups have some cohesive, collective viewpoint. ... The nexus

> between diversity of control and diversity of content concerns such things as selection of topics for coverage in news, editorials, and programming, the emphasis accorded to the issues, and the fairness with which the issues are presented, as well as the consideration given to the manner in which various groups are portrayed in the media.
>
> It has been noted that even shows purportedly catering to the "woman viewer" have been criticized for failing to deal with matters of concern to working women such as professional opportunities, child care, sexual harassment on the job, or equal pay; instead they focus exclusively on cooking, sewing, fashion, and beauty hints. One suspects that such women's programs are in fact fashioned by men according to their own conception of what women want and need (pp. 1208-09).

B. Justice Scalia

While Scalia's joining with Judge Bork's argument against the constitutionality of the Fairness Doctrine will warm the hearts of many civil libertarians and many more broadcasters, few

such encouraging words are to be found in Scalia's opinions in this category of cases during his first year on the high Court. One of the two exceptions (City of Watseka, Illinois vs. Illinois Public Action Council, 1987), like the Los Angeles Airport case discussed earlier, was too easy a case to weigh heavily. Here the Court summarily affirmed a lower court ruling which had invalidated a local ordinance that limited all door to door solicitations (for purely commercial, or regligious, or political purposes) to the hours 9 AM to 5 PM. No opinions were written.

The other apparently pro-speech decision comes from Federal Election Commission vs. Massachusetts Citizens for Life (1987), which found unconstitutional the application to the pro-life group of portions of the Federal Election Campaign Act that prohibited corporate expenditures in connection with any election to public office without setting up a separate entity (a PAC) for that expressed purpose. Justice Brennan, in a majority opinion joined by Scalia, pointed out that one major reason for the law was to protect the interests of a corporation's patrons, employees, and shareholders, who have financial relationships with the corporation, but do not necessarily share the Board of Directors' political agenda. Persons who buy Coors beer do not necessarily wish their money to go to conservative political candidates.

This interest, while laudable, would not be jeopardized by permitting a group like MCFL to make expenditures for political purposes. "Individuals who contribute to MCFL," Brennan wrote, "are fully aware of its political purposes, and in fact contribute precisely because they support those purposes" (p. 4073).

Another case heard during the 1986-87 term dealing with the conduct of elections (Munro vs. Socialist Workers Party, 1986) found Scalia (who joined Justice White's majority opinion) opposing Brennan. At issue was a state of Washington law stipulating that, in order to have one's name appear on the ballot in a general election, a minor party candidate must have received at least 1% of the total votes cast in the primary election. The majority upheld the law's constitutionality over Justices Brennan and Marshall's objection. Minor party candidacies are often aimed not at actually getting elected, the dissenters argued, but instead serve to

> broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. Moreover the very existence of minority candidates on the ballot provides an outlet for

> voters to express dissatisfaction with the candidates or platforms of the major parties (p. 4055).

The magic number at issue in Arkansas Writers Project vs. Ragland (1987) was not a 1% minimum vote, but a 4% sales tax. The tax was imposed on virtually all retail goods in the state; exempted were religious, professional, sports and trade journals, but not general interest magazines. The plaintiffs were publishers of such a general interest magazine; Justice Marshall's majority opinion held that their rights were violated "because the basis on which Arkansas differentiates between magazines is solely upon its content" (p. 1727; emphasis in original). Justice Scalia, whose dissenting opinion starts from the premise that the purpose behind such a widely applied sales tax was surely not to inhibit speech, also cautions the majority wisely that the ruling will be a difficult one to interpret narrowly in the future, because it

> casts doubt upon a wide variety of tax preferences and subsidies that draw distinctions based upon subject matter. The United States Postal Service, for example, grants a special bulk rate to written material disseminated by certain nonprofit organizations— religious, educational, scientific, philanthropic, agricultural, labor, veterans', and fraternal organizations.... Must this preference be justified by a "compelling governmental need" because a

> nonprofit organization devoted to some other purpose—dissemination of information about boxing, for example—does not receive the special rate? The Kennedy Center, which is subsidized by the Federal government in the amount of up to $23 million per year, is authorized by statute to "present classical and contemporary music, opera, drama, dance and poetry." Is this subsidy subject to strict scrutiny because other kinds of expressive activity, such as learned lectures and political speeches, are excluded (p. 1732)?

Judicial deference to other branches of government seemed to be the theme explaining the votes cast by Scalia in the last two cases to be examined in this section. Turner vs. Safeley (1987) asked the Court to rule on the constitutionality of, among other things, regulations of the Missouri Department of Corrections that greatly restricted the mail that inmates in one institution could send to inmates in another institution. Unless such mail dealt with legal matters, or was addressed to immediate family members, the prison officials would have complete discretion to determine (on a writer-by-writer, rather than a letter-by-letter basis) whether the mail should go through. Scalia joined Justice O'Connor's majority opinion upholding the regulational scheme, finding that "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts"

(p. 4723). (O'Connor's opinion did, however, strike down other regulations limiting prisoners' right to marry).

In probably the most celebrated case of the 1986-87 term, Scalia's dissenting opinion alerted readers that here is a Justice who makes deference more of a religion than a judicial doctrine. Reference is made, of course, to Edwards vs. Aguillard (1987), the "scientific creationism" case. The 7-2 majority ruling, which one Harvard scientist (Gould, 1987) called a victory that belongs to the teachers, ("not to us few who thrive unharassed in elite universities, but to those thousands who labor without adequate recompense or recognition in the nation's public schools"), struck down a Louisiana law requiring that any teacher who instructs students in Darwin's evolutionary theory must also provide instruction in the tenets of so-called scientific creationism. Scalia's dissenting opinion reflected his view that the Louisiana legislators, whether we agree with them or not, found some merit to the scientific underpinnings of creationism, and judges should not second-guess them. In a fascinating co-opting of civil libertarian rhetoric, Scalia characterized the majority ruling as a defeat for academic freedom, in that the rights of students to hear the tenets of creationism were being abridged.

Scalia also was undisturbed by the blatantly sectarian motives of the legislators. "We surely would not strike down a law providing money to feed the hungry or shelter the homeless," he chided his brethren, "if it could be

demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved" (p. 4870).

Perhaps it would be too kind to summarize the pattern of Scalia's decisions in the category of cases just examined as a mixed bag. Still, there were some opinions that likely surprised and encouraged pro-speech proponents. Chief among these is undoubtedly Scalia's joining with Judge Bork to call for an end to the second-class status forced upon broadcast, as opposed to print, media. Despite the dismal First Amendment record Scalia presents in virtually all other contexts, this one stance is hardly the kind one would expect from the anti-press ogre often depicted in the trade papers.

IV. Government and information control

In this section we look at controversies surrounding the government's coerced disclosure of information and the government's retention and use of information already on file. As with the defamation category discussed earlier, all of the cases in this section were heard by Judge, rather than Justice, Scalia.

The first case demanding our attention represents one of Scalia's darkest hours from a first amendment perspective. At issue in Block vs. Meese (1986) was the Foreign Agents Registration Act, which requires that any organization that "serves a foreign government, political party, or corporation" must register with the Justice Department. Further, any such agents must notify the Justice Department within 48 hours after they transmit "any political propaganda for or in the interests of its foreign principal" (p. 1307). "Political propaganda" is defined under the Act as any form of communication "reasonably adapted to prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public with reference to the political or public interests, policies, or relations" of that foreign principal.

The artifacts in the case were 3 films produced by the National Film Board of Canada (2 dealing with acid rain, the third the award-winning anti-nuclear proliferation film, IF YOU LOVE THIS PLANET) which the Justice Department had labeled "political propaganda." The film board and its distributing agents (including Block) would thus have to provide to the Justice Department information regarding every group showing of the film--what organization screened it, where and when, and for how many people, etc.

As a threshhold statutory matter preliminary to any constitutional analysis, Judge Scalia had to deal with Block's mustering of legislative history to the effect that these simply were not the kinds of films Congress had in mind when it passed the Foreign Agents Registration Act, that the "political propaganda" label should not be imposed unless the films are truly "subversive." Scalia was unmoved:

> To legislate is to generalize, and a law motivated by a desire to eliminate a particular abuse often sweeps within its reach activities that do not themselves display that abuse. . . . We do not sit to rewrite laws so that they may address more precisely the particular problems Congress had in mind (p. 1309).

Scalia then went on to address the first amendment issues raised by the case. In a puzzling section of his opinion, he attempts to distinguish this case from others in which abridgments of speech were not permitted by the Court: "There is no contention, nor could there be, that the government has sought to prohibit the obtaining or exhibiting of the films, to limit the times or places of exhibition, to condition exhibition upon registration or permit approval, /or/ to condition receipt of the films upon any type of official act" (pp. 1310-11; emphasis in original). This latter underlined distinction he drew between the instant case and the earlier Lamont vs. Postmaster General (1965). But just as the earlier case required a kind of "official act" in order to permit the communication to occur (recipients of mail from Communist countries were to be notified by Postmaster, and asked to indicate in writing if they wanted to receive this mail), so too the disclosure requirements of the FARA constitute just such an "official act" that, although not strictly a pre-requisite to the communication, must be made within a short time thereafter under penalty of law. To this writer the two cases are not nearly so distinct as Scalia makes them out to be.

Block challenged both provisions of the FARA that applied to his films--the government's labeling them political propaganda and

the required "dissemination reports." Concerning the former provision, Scalia eloquently co-opts the language of the civil libertarian in upholding the law: "A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler, but not to denounce Nazism" (p. 1313).

The dissemination requirements troubled Scalia a bit more, however, and commanded most of his attention. The legitimate state's interest to weigh in the balance here, he reminds us, is disclosing to the public the nature and extent of agents' dissemination of foreign advocacy. This is not an interest "of the highest importance," Scalia admits, and may fall before a plausible free speech argument.

Yet Scalia strains mightily in dismissing Block's highly plausible free speech arguments. First, Block asserted the right "to receive ideas in privacy." This interest might prevail IF the plaintiffs were organizations seeking to show the film privately, in-house, to their own members, Scalia grants. But the groups in this case wished to <u>disseminate</u> the message to the public, so there is no associational privacy claim to weigh.

Second, Block asserted the right to speak anonymously, a right that Scalia also dismisses as inapplicable to this case:

> It seems to us inconceivable that the reporting requirement could have a substantial effect upon this associational interest. The showing of films is by its nature not an anonymous enterprise. Unlike pamphlets, which can be distributed incognito on a street corner and passed from hand to hand thereafter, films require procuring an exhibition hall and publicizing the time and place of showings, activities not readily conducive to anonymity (p. 1313).

The fundamental flaw in Scalia's argument is his implicit premise that anonymity is an all-or-nothing proposition. That one may (or may not) need to engage in a fair amount of publicity in order to fill a movie screening does not negate the additional amount of anonymity lost by coerced disclosure to the government (and to the public at large, in that FARA requires the Justice Department to make public records of all dissemination reports). Moreover, Scalia's attempt to distinguish the pamphleteer and the movie distributor fails, in that one can screen a film for a limited public just as anonymously as one can pass out a pamphlet

on the street. The audience may see a film without necessarily learning the name and politics of the sponsoring organization.

The Supreme Court has recently upheld the constitutionality of the labeling requirement of the FARA applied to these same three films in a 5-3 decision, with Justice Scalia not participating (Meese vs. Keene, 1987). The Court did not reach the issue of the constitutionality of the requirement that distributing agents report back to the Justice Department details of each screening of the films.

In another FARA case, Attorney General vs. Irish People (1986), the foreign agents fared slightly better than did movie distributor Block. Irish People is a weekly newspaper alleged by the Justice Department to be an agent of, among others, the IRA. The federal district judge below had granted summary judgment for the Attorney General, finding that the publishers would have to register with the Justice Department. In a per curiam opinion for a 3-judge panel of which Scalia was part, the DC Circuit Court of Appeals remanded to the lower court for further proceedings, instructing it to be extremely cautious, to carefully determine whether the publishers were truly foreign agents or merely citizens whose own political views happen to be consonant with one or more foreign principals.

The issue posed by Nagel vs. U. S. Dept. of HEW (1984) concerned the propriety of the government's retaining on file information it already had, rather than compelling disclosure. Nagel was an employee of an HEW operated hospital in Washington. During classes conducted during the work day for employees and others by the Washington School of Psychiatry, Nagel was overheard by two fellow coworkers to utter remarks critical of his employing institution. These coworkers made written complaints to the hospital's personnel administrators, who declined to take any disciplinary action against Nagel, but decided to keep the complaints in file. Nagel sued under the federal Privacy Act, which provides in pertinent part that no record's shall be kept concerning a citizen's exercising of his First Amendment rights, except for the purposes of "an authorized law enforcement activity." Judge Weigel (with Scalia joining) interpreted this provision extremely broadly, opining that "an employer's determination whether an employee is performing his job adequately constitutes an authorized law enforcement activity . . . A federal agency does not violate the /Privacy/ Act if it records, for evaluative or disciplinary purposes, statements made by employees while at work" (p. 1441).

Sometimes one First Amendment controversy begets another, as shown in Judge Scalia's opinion for a divided panel of the DC Circuit In re the Reporters Committee for Freedom of the Press (1986). This "access to information" case was born of the aforementioned libel suit involving William Tavoulareas. At issue was the committee's request to the court for access, while the libel trial was being played out, to various materials and exhibits introduced at trial. Mobil persuaded the court to seal some 3,000 pages, on the grounds that much of the material there was sensitive and confidential and would have an adverse effect on Mobil's overseas shipping operations. The protrective order remained in effect for approximately 2 months after the trial had ended, and was lifted when it became clear to the trial judge that Mobil's reasons for seeking the order were not compelling after all.

The majority opinion painstakingly distinguishes this case from a body of Supreme Court caselaw that holds that courtroom documents are presumptively open to the press and the public. Unlike this case, Scalia points out, the earlier rulings dealt with a) criminal trials, and b) events actually transpiring in court, not exhibits that are merely entered but not read.

Judge Wright's dissent points out that Scalia stands alone on this issue, in that other Circuits that have addressed it have granted press access to civil courtroom exhibits. Wright also seems to accuse his colleague of burying his head in the sand and failing to see the real issue involved here:

> The facts of this case provide an object lesson in the importance of assuring a <u>contemporaneous</u> presumptive right of access to trial exhibits. Mobil initially swept thousands of pages under the November 5, 1981 umbrella protective order. When put to its proof, Mobil only specifically contested the confidentiality of three of these documents (and only contested two of them in a consistent manner). When the trial judge examined Mobil's brief justification for its claim of confidentiality for these documents it found it insufficient to sustain a permanent seal.
>
> Mobil fully understood that it would some day have to justify its claims of confidentiality. Indeed, the terms of the July 20, 1982 order made plain that the court would determine the confidentiality of the documents at issue shortly after completion of the trial. Mobil was presumably aware that many of its allegations would ultimately fail to pass muster. Nonetheless, Mobil indiscriminately sought to

> take maximum advantage of the terms of the provisional seal, obtaining the one sure benefit the July 20, 1982 order could provide: delay. Once the trial was over, and the glare of publicity had subsided, Mobil voluntarily waived its claims to confidentiality. Such conduct, if nothing else, belies the majority's assertion that little turns on the timing of the public's presumptive right of access (p. 1353).

No discussion of controversies surrounding access to government information would be complete, of course, without a review of relevant caselaw in which Scalia was called upon to apply the federal Freedom of Information Act. There is no shortage of such litigation during Scalia's tenure on the DC Circuit Court of Appeals; the LEXIS search uncovered 15 cases from Scalia's days as an appellate judge; he has not, however, yet had the opportunity to hear a FOIA case on the Supreme Court.

The pattern of Scalia's FOIA rulings, with few exceptions (Public Citizen Health Research Group vs. FDA, 1985; Church of Scientology of California vs. IRS, 1986; Washington Post vs. U. S. Dept. of HHS, 1986; Arieff vs. U. S. Dept. of the Navy, 1983), can be described as no less than disastrous from a civil liberties perspective. Scalia has been called upon to interpret the scope of

the majority of FOIA's nine exemptions. He has generally been deferential to government agency's assertions that disclosure was not warranted, whether such arguments are based upon national security (Miller vs. Casey, 1984); privacy of personnel records (Ripskis vs. Department of Housing and Urban Development, 1984); fear that disclosure would inhibit either future internal communications within an agency (Center for Auto Safety vs. Environmental Protection Agency, 1984; Durns vs. Bureau of Prisons, 1986) or law investigation information gathering (Shaw vs. FBI); on the grounds that other valid federal legislation precludes disclosure (Miller vs. Casey, 1984; Ryan vs. Bureau of Alcohol, Tobacco and Firearms, 1983). In one case, dissenting from a decision not to rehear en banc a pro-press FOIA decision, Scalia even went so far as to infer a Congressional intent to preclude disclosure where no such intent was explicitly set forth in any relevant legislation (Washington Post vs. U. S. Dept. of State, 1982).

Scalia's FOIA record is also one of deference to agency assertions that its searches have been in good faith (Hill vs. United States Air Force, 1986) even when clear evidence had been presented at trial to the contrary (Meeropol vs. Meese, 1986).

He defers to trial judges who opt not to make in camera inspections of requested documents (Center for Auto Safety vs. EPA, 1984) and to government assertions that the records sought are not "agency records" at all under the Act (International Brotherhood of Teamsters vs. National Mediation Board, 1983). He has even permitted the use by the government of countersuits against FOIA requestors, compelling such litigants to come forward with proof as to why they believe that the government's search for documents has been inadequate (Weisberg vs. Webster, 1984). In this case, moreover, Scalia upheld the trial judge's complete dismissal of the original FOIA request litigation for failure of the requestor to satisfy the government's subpoena.

Few rays of hope emerge from the pattern of votes and published opinions in this category of cases. The ruling in the Irish People case, cautioning the government not to sweep too broadly in its application of the FARA to dissidents, is one encouraging exception. So too are the tiny handful of pro-disclosure FOIA votes cast by Scalia. In the final judgment, however, Judge Scalia's stinginess with respect to press and citizen access to information seems to match his stinginess in granting the press freedom to comment on public issues without incurring heavy financial liability in defamation suits.

V. Antonin Scalia and the first amendment—a tentative assessment

A careful review of Antonin Scalia's first amendment caselaw calls to mind Mark Twain's famous response to a media misstatement concerning his physical health. "The reports of my death," Twain quipped, "are greatly exaggerated."

The assessment of Antonin Scalia as the devil personified by the media trades may not be greatly exaggerated, but it is at least slightly so. True, his record in defamation actions is deplorable from the press's perspective (all the more so because he is such an articulate spokesperson for the competing interest in such cases, the reputations of those we talk about and write about). His record in FOIA cases and related litigation is equally deplorable from a First Amendment stance.

But Scalia tends to adopt a fairly libertarian stance when prior restraints are before him (note especially his "one-upsmanship" with Judge Bork in the Lebron case), and he is now on record along with Bork as one who questions the wisdom and constitutionality of decades of Supreme Court caselaw granting

electronic media only a diluted measure of first amendment protection.

It is probably too early to make long-term projections about Justice Scalia's likely future performance dealing with First Amendment controversies beyond his first term on the high court. Still, the tentative assessment provided here--that Scalia may not be quite so anti-press as initially feared--finds some backing in a New York Times article which reported that in the first 4 months of the 1986-87 term, Justice Scalia voted with Justice Brennan in 6 of the 13 cases that found Brennan's vote in opposition to that of Chief Justice Rehnquist (Taylor, 1987). That is hardly the kind of record one would expect from a kneejerk right-wing ideologue.

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